

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No.
96-115		
	)	
Telecommunications Carriers' Use of Customer	)	
Proprietary Network Information and	)	
other Customer Information;	)	
	)	
Petition for Rulemaking to Enhance Security and	)	RM-11277
Authentication Standards for Access to Customer	)	
Proprietary Network Information	)	

**THE COMMENT OF  
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Comment in response to the FCC's Notice of Proposed Rulemaking (NOPR) on disclosure of Customer Proprietary Network Information (CPNI) released on February 14, 2006 (the CPNI NOPR). The major thrust of the CPNI NOPR is whether, and how, the current federal regulations should be revised to address an alleged ability of "data brokers" to obtain and release CPNI.

The PaPUC appreciates the opportunity to file this Comment. As an initial matter, the PaPUC Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC. The suggestions contained in the Comment may change in response to subsequent events. This includes developments at the federal or state level.

Our suggestions reflect the PaPUC's statutory limits on the imposition of additional reporting obligations on carriers absent a proceeding to examine the cost and benefits of additional reporting obligations, 66 Pa.C.S. §3015(f). The PaPUC's suggestions also address this federal question in light of Pennsylvania law that generally provides more protections for privacy than federal law. 66 Pa.C.S. §3019(d). Finally, the suggestions reflect Section 102 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §102, which holds that a provider of analog cellular service not otherwise a public utility does not come within the definition of a public utility service under Section 102. The PaPUC suggests that states be allowed to decide whether or not they will enforce any final federal requirements. States that decline to enforce federal requirements would refer any objection to the FCC.

First, the PaPUC suggests that the FCC recognize that states differ on the protection afforded information of the type identified in the CPNI NOPR and the EPIC Petition. The PaPUC notes that Pennsylvania's privacy protections can be more stringent than federal standards.

The Pennsylvania Constitution and the courts also have stricter privacy standards as well. *Commonwealth v. Schaeffer*, 536 A.2d 354, 360 (1987) (Pennsylvania Constitution Article I, §8 offers more protection to the right of privacy than exists in the federal regime); *In re: B*, 394 A.2d 418, 425 (1978)(Pennsylvania Supreme Court recognizes that some Pennsylvania rights of privacy are more stringent than the federal equivalent); *Commonwealth v. Stenger*, 609 A.2d 796, 800 (Supreme Court rejects the flexible approach and holds that only a compelling state interest may

warrant disclosure of personal matters).

Section 3019(d) of the Pennsylvania Public Utility Code prohibits a telecommunications carrier from disclosing any information relating to a customer's pattern of use, equipment, and network information and any accumulated records about customers, with the exception of the name, address, and telephone number, unless otherwise disclosed pursuant to a court order or permitted by other state and federal law.

Finally, the PaPUC initiated an investigation into the issue of identity theft, an issue that could be aggravated by unauthorized releases of CPNI. In that proceeding at Docket M-00041811, the PaPUC examined how Pennsylvania utilities handle private information and encouraged companies to implement proactive measures to mitigate identify theft.

Given these considerations, the PaPUC suggests that the FCC consider the development of any federal regulation or resolution in a manner that does not undermine or override state law providing greater protection for privacy than federal law. Moreover, in view of different state and federal privacy standards, the FCC should consider an approach that allows the states and the FCC to protect privacy through the imposition of requirements and penalties for violations of CPNI rules. The FCC should consider an approach in which federal rules constitute a regulatory floor as opposed to a regulatory ceiling. The FCC should not preclude state authorities from developing standards that accord with their privacy standards so long as those requirements do not unduly burden interstate commerce while advancing a compelling state interest. The PaPUC suggests that this form of

cooperative federalism is better than preemption of state authority and then delegation of enforcement of that federal standard to the states.

The PaPUC next suggests that the FCC consider an approach that avoids the controversies over “opt-in” and “opt-out” regulations. The FCC should avoid a standard that deems customers’ failure to object to a proposed release to constitute consent to a release of CPNI (the “implied consent” or “Opt Out” approach). Instead, the PaPUC suggests that the FCC consider a regulatory structure that authorizes the release of CPNI only with a customer’s affirmative express consent (the “prior authorization” or “Opt In” approach). The consent or prior authorization to release of CPNI could be oral, written, or by electronic means.

The PaPUC recognizes that unauthorized releases of CPNI, in addition to violating any federal standard, may also violate Section 3019(d) of the Pennsylvania Public Utility Code. For these reasons, the FCC should consider a requirement that the carrier must inform the customer whenever there is an unauthorized release of CPNI outside the scope of the customer’s opt-in approval.

The PaPUC’s suggestion on notification of unauthorized releases of CPNI emphasizes the customer’s right to respond proactively in a cost-effective manner. Further, the PaPUC’s suggestions should minimize the carrier, and ultimately customer, costs to protect CPNI.

The PaPUC suggests that the FCC consider an approach in which the state commissions and the FCC be jointly empowered to conduct

investigations, develop additional requirements, or impose penalties for violation of the FCC's CPNI rules. Federal rules should be a regulatory floor and not a ceiling. State authorities should be permitted to enforce federal rules or supplement federal rules if those rules do not unduly burden interstate commerce and advance an important state interest such as Pennsylvania's stringent privacy standards. This form of cooperative federalism is better than preemption of state authority and delegation of federal enforcement to the states.

The PaPUC suggests that there may be no need to authorize two regulatory agencies to simultaneously address the same issue. The PaPUC suggests that the agency receiving the customer's complaint pursue the matter. If, for example, a customer files a complaint with the FCC, the state regulator awaits resolution of the federal proceeding. On the other hand, if a customer files a complaint with the state regulator, the state regulator would examine the matter. An unhappy customer could file an objection with the state's decision with the FCC.

The last recommendation addresses customer education. The PaPUC suggests that the FCC consider a customer-education campaign following enactment of any final regulations. The FCC'S current regulations require that carriers maintain a record of all instances where CPNI is disclosed to third parties or where third parties were allowed access to CPNI. *See* 47 C.F.R. §64.2009(c).

The PaPUC suggests that the FCC consider an approach in which carriers affirmatively act to educate their customers about prior releases of

CPNI. The PaPUC suggests that one approach could be a process in which the carriers inform their customers annually in a bill insert that the carriers retain data on disclosures or access to a customer's CPNI and that the customers have a right to request this data from the carrier so the customer can review the information for any unauthorized releases. This suggestion is modeled on actions undertaken in the credit card industry where customers are usually given an annual notice and advised to inspect the results annually to ensure that no credit cards are issued fraudulently in their name.

The PaPUC also suggests, however, that a federal assessment on interstate revenues fund such a federal initiative. Public education campaign costs should not be recovered from intrastate revenues and the states should not fund this federal initiative.

The PaPUC suggests that the FCC consider these suggestions as a form of "Cooperative Federalism" that does not undermine the states' ability to address customer matters. The PaPUC suggests that the FCC allow a state, including states that do not otherwise address wireless matters, to address federal requirements on CPNI releases. In those instances where a state does not address privacy or elects to not enforce federal requirements, customers would be referred to the FCC for enforcement. This suggestion balances state law with customers' expectation that state regulators address these kinds of issues. It also minimizes the potential long-term implications of expansive preemption.<sup>1</sup>

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<sup>1</sup> In this regard, the PaPUC suggests that the FCC consider the long-term impact of federal mandates that lack the requisite funding. A practice of preemption, centralization of authority at

The PaPUC appreciates the opportunity to file these suggestions in a Comment. The PaPUC may file a Reply Comment following a review of the filed Comments.

Respectfully submitted,  
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the federal level, and delegation of federal mandates may have long-term negative impacts on the sovereigns' ability to protect the intrastate public interest.